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No. 91-1586

IN THE

Supreme Court of the United States

October Term, 1991

SUPER VALU STORES, INC.,
Petitioner,

v.

IOWA DEPARTMENT OF REVENUE AND FINANCE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

PETITIONER'S REPLY BRIEF

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I. THE FEDERAL QUESTION PRESENTED IN THE PETITION WAS RAISED AND DECIDED IN THE STATE COURTS.

The Department contends that the federal question presented in the Petition was not raised before the Department in the administrative proceeding or decided by the Iowa Supreme Court and therefore is not properly before this Court.[1] This contention has no substance.

The Iowa Supreme Court clearly ruled on the federal constitutional question. It referred by name to the Due Process and Commerce Clauses and extensively discussed this Court's unitary business decisions under those provisions. Petition for a Writ of Certiorari, Appendix ("Pet. App.") 7a-10a. It separately defined the weight to be given administrative "construction of a statute" and that to be given administrative "interpretation and application of Supreme Court cases applying the unitary business concept." Pet. App. 8a. It did not even acknowledge the Department's contention on brief (Respondent's Brief in Opposition, Appendix ("Res. App.") 8a) that Super Valu had failed to assert a timely constitutional claim.

The Department nevertheless contends (Res. B. 9-10) that the Iowa Supreme Court recognized that it was passing only on state law questions because it stated that "if the businesses are not unitary, any gain on the sale would be included in Super Valu's return in the state of its domicile, Minnesota." Pet. App. 7a. This is not so. It is true that

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[1] The Department does not deny that the federal question was presented to the Iowa District Court and Iowa Supreme Court. *See* Respondent's Brief in Opposition ("Res. B.") 8.

under Iowa law (Iowa Code § 422.33(2)(a)(4), Pet. App. 66a) the non-unitary gain of a nondomiciliary corporation is not taxable by Iowa, but this is equally true as a principle of constitutional law under this Court's holdings in *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307 (1982), and *F. W. Woolworth Co. v. Taxation and Revenue Dept.*, 458 U.S. 354 (1982).

The relevance of the Iowa Court's statement to both federal and state law underscores that in this case the federal and state questions were *identical* because state law has incorporated by reference the unitary business principle that governs the federal question—even to the point of citing this Court's decisions in the state's regulation. *See* Iowa Admin. Code, Rule 701-54.2(1)(422), Pet. App. 68a. In applying the unitary business principle to this case, therefore, the Iowa Court decided both federal and state questions.[2]

Since the Iowa Supreme Court considered and decided Super Valu's federal constitutional claim, it is irrelevant whether Super Valu raised the claim in the administrative proceeding. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2517 (1991). However, the claim *was* asserted there as well as in the Iowa courts. Super Valu commenced the administrative proceeding by filing a Protest of the Department's assessment (reproduced in Appendix A, *infra*, at 1a-11a) that discussed and applied the recent decisions of this Court involving the unitary business principle. Paragraph 15 of the Protest states:

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[2] Where a state court has felt compelled to construe and apply state law according to its understanding of federal constitutional considerations, the state court decision raises a federal issue that gives this Court jurisdiction. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

> In summary, functional integration, centralization of management, and economies of scale did not exist in this case. Therefore, County Seat and ShopKo [another Super Valu subsidiary not involved in this case] were not engaged in a "unitary business" with Super Valu and its other subsidiaries, and Super Valu may not *constitutionally* be required to consider the gain from the sale of County Seat as business income for purposes of computing the Iowa income tax liabilities of Super Valu.

Appendix A at 9a. (Emphasis added.)[3]

The opinion of the Iowa Supreme Court (including its failure even to respond to an argument of the Department similar to that made here) establishes that the Court considered and decided Super Valu's constitutional claim. Furthermore, Super Valu timely raised its federal constitutional claim in the administrative proceeding and subsequently on judicial review.

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[3] The discussion in the Protest of this Court's recent unitary business decisions and their applicability to this case leaves no doubt as to the constitutional provisions at issue, and the decision of the Department extensively discussed this Court's decisions. *See* Pet. App. 39a-41a, 43a-44a, 46a-51a, 60a-63a. Both this Court and the Iowa Supreme Court have held that a failure explicitly to cite a particular constitutional provision is immaterial if it is clear from context that a party intends to rely upon the provision. *See Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 598-599 (1954) (due process issue "within the clear intendment" of taxpayer's contention); *Office of Consumer Advocate v. Iowa State Commerce Commission*, 465 N.W.2d 280, 283-284 (Iowa 1991) (argument to the contrary "elevates form over substance").

II. THIS CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION CONCERNING THE PROPER APPLICATION OF THE UNITARY BUSINESS PRINCIPLE TO CORPORATIONS ENGAGED IN DIVERSE BUSINESSES.

The Department does not actually deny (Res. B. 10-13) that application of the unitary business principle to corporations engaged in diverse businesses presents a substantial federal question. It argues instead that in this case an alternative constitutional ground existed for Iowa's taxation of Super Valu's capital gain if a unitary business relationship did *not* exist between Super Valu and County Seat. The asserted ground is the presence in Iowa of *County Seat*, which the Department contends "obvious[ly]" permitted the State to tax the gain.[4] Res. B. 11. The argument is flawed in two important respects.

First, it asserts constitutional authority for applying the apportionment statute based upon a fact (the Iowa presence of County Seat) entirely different from the fact on which the application of the statute, by its terms, is actually premised (the treatment of Super Valu's gain as "business income"). The Department acknowledges that "the [Iowa] allocation statutes with respect to income from intangibles of nondomiciliary corporations do not consider the actual income-producing activities in Iowa." Res. B. 4. It nevertheless argues in substance that the *constitutionality* of a statute as applied may be sustained solely on the basis of

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[4] County Seat operated 10 stores in Iowa. Pet. App. 28a.

a fact that is irrelevant in *applying* the statute. The proposition is clearly unsound. If the legislature decides that a particular fact is not relevant to the application of a statute, the *constitutionality* of the statute as applied cannot rationally turn upon the fortuity that the fact is present. The Department's alternative ground is therefore irrelevant to the disposition of this case and will not have to be addressed by this Court upon review.[5]

Second, even if the Department could properly assert a constitutional argument at variance with the statute, it errs in arguing that its alternative constitutional ground is "obvious[ly]" correct. The Department cites no authority for the alternative ground, and this Court has in fact never held that the *presence* of a subsidiary is a sufficient ground for taxing the income of the parent attributable to its ownership of the subsidiary.[6] On the contrary, the Court has consistently stated that "the linchpin of apportionability in the field of state income taxation is the unitary-business principle." *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 439 (1980). The unitary business principle is the only ground on which the Court has permitted a state to tax the

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[5] *Cf. Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 570 (1949) (Court declined to consider constitutional argument because "[w]e deal with the taxing plan as an entirety as we find it in operation *and pass only on the constitutionality of that which the State has asserted power and purpose to do.*") (Emphasis added.)

[6] Indeed, in Section III of its brief, where the Department seeks to justify the Iowa Court's decision as being consistent with the decisions of this Court, the Department refers *only* to the "unitary business" principle. Res. B. 13-22.

income of a nondomiciliary corporation from intangibles (other than short-term investments of working capital).[7]

The Department also errs in suggesting (Res. B. 13) that its alternative ground reconciles the decision below with the California, Missouri and Michigan cases cited by Super Valu (Pet. 11-16), in which diverse businesses were held to be non-unitary. The Department claims that the cited cases, unlike this case, did not involve situations "where all of the alleged diverse components of a nondomiciliary enterprise engaged in income-producing activities in the taxing state." *Id.* Apart from the fact that conflicting judicial decisions cannot be reconciled on the basis of a rationale that they did not consider, the cases cited by Super Valu *did* involve situations in which both of the diverse components were engaged in business in the taxing state. In *Tenneco West, Inc. v. Franchise Tax Board*, 234 Cal. App. 3d 1510, 286 Cal. Rptr. 354 (1991), *pet. for rev. denied* (Cal. Jan. 30, 1992), the California Court of Appeal

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[7] In *ASARCO* the taxpayer conceded that income from the short-term investment of working capital was taxable (458 U.S. at 337-38 & n. 5, O'Connor, J., dissenting), but this concession had nothing to do with the location of the issuer of the securities. In *Allied-Signal Inc. v. Director, Division of Taxation, cert. granted*, 112 S. Ct. 632 (Nov. 27, 1991) (No. 91-615), New Jersey has urged the Court to abandon the unitary business principle as a limitation upon the power of a state to tax the income of a nondomiciliary corporation doing business in the state. *See* Respondent's Brief on Rearg. at 27-33; Respondent's Reply Brief on Rearg., *passim*. New Jersey has, however, explicitly disclaimed any reliance upon the theory that the Department is asserting here. Although ASARCO, the subsidiary at issue in *Allied-Signal*, did business in New Jersey, New Jersey has stated that "the presence of ASARCO in New Jersey is irrelevant" to its argument. Respondent's Brief on Rearg. at 41 n. 29. *See also* Tr. Oral Arg. of March 4, 1992 at 4-5.

noted that, of the four subsidiaries held to be non-unitary with the parent, three were engaged in business in California (286 Cal. Rptr. at 360); the court attached no significance to this fact in reaching its conclusion. In *James v. International Telephone & Telegraph Corp.*, 654 S.W.2d 865 (Mo. 1983), the taxpayer's subsidiaries did business in Missouri, but the court ignored this fact in holding the gains from the sale of the subsidiaries' stock to be non-apportionable. (*See* Appellant's Reply Brief in *James* at 7, reproduced in App. B, *infra*, at 12a.)[8]

The Department's suggested alternative constitutional ground for taxing Super Valu's capital gain is thus irrelevant to the case. Since Iowa law does not rely upon such a ground for taxing the gain, and this Court has never approved it, it provides no basis for concluding that the constitutional issue actually decided by the Iowa Supreme Court fails to present a substantial federal question.

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[8] Similarly, in the two Michigan cases, the courts held that divisions of a Michigan corporation operating a speedway in Texas and of a Michigan proprietorship operating a cattle ranch in Montana were non-unitary with the Michigan activities of the taxpayers although centralized management services were performed for the out-of-state divisions in Michigan. *See Holloway Sand & Gravel Co. v. Department of Treasury*, 152 Mich. App. 823, 393 N.W.2d 921 (1986), and *Jaffe v. Department of Treasury*, 172 Mich. App. 116, 431 N.W.2d 416 (1988), *app. denied*, 432 Mich. 911 (1989), *cert. denied*, 493 U.S. 1025 (1990).

III. THE IOWA COURT'S DECISION CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Department acknowledges that the applicable test in this case is the unitary business test of *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983). Like the Iowa Court, however, the Department fails to acknowledge that in determining the presence or absence of a unitary business relationship under *Container*: (1) it is necessary to distinguish capital transactions having an "investment function" from those having an "operational function" (463 U.S. at 180 n. 19); (2) it is necessary to distinguish a managerial role grounded in the parent's "operational expertise" and "overall operational strategy" from that exercised by *any* parent over its investment in a subsidiary (463 U.S. at 180 n. 19); and (3) it is reasonable to presume that functional or operational integration–the most important index of a unitary business–is far less likely to exist if corporations are engaged in diverse businesses (463 U.S. at 178).

Because it misconstrued the *Container* test, the Iowa Court found–as this Court has never found–that a unitary business relationship existed between corporations engaged in diverse businesses. The Iowa Court relied principally upon Super Valu's potential for control of County Seat, intercompany financing, and certain shared administrative services. Pet. App. 10a-12a. The court did not (and could not) specifically find the two corporations to be *functionally* integrated. In holding that a unitary business relationship nevertheless existed, the Iowa Court departed from the legal standard approved by this Court. Its error has been noted by New Jersey in a brief filed with this Court in

Allied-Signal (*supra*, 6 at n. 7): "[O]ther courts applied *ASARCO* and *Woolworth* but ignored the requirement of substantial operating links, relying instead on administrative and financial connections. *Super Valu Stores, Inc. v. Iowa Dep't. of Revenue and Finance*, 479 N.W.2d 255 (Iowa 1991)." Respondent's Brief on Rearg. at 17. In ignoring the requirement of functional integration, the Iowa Court has misread not only *ASARCO* and *Woolworth* but *Container* and *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980),[9] as well.

The Department's discussion of capital transactions (Res. B. 21) highlights its misunderstanding of *Container*. The Department argues that the cash management system maintained by Super Valu and its subsidiaries served an "operational" function (*Container*, 463 U.S. at 180 n. 19) by enabling Super Valu and County Seat to "[pool] financial resources" and thereby "[ensure] growth and stability in the food and clothing businesses." The Department thus relies simply upon transfers of funds among corporate affiliates, "the kind of behavior that one would expect to find in any parent subsidiary or parent division relationship." *See Tenneco West, Inc. v. Franchise Tax Board*, 234 Cal. App. 3d 1510, 286 Cal. Rptr. 354, 363 (1991), *pet. for rev. denied* (Cal. Jan. 30, 1992).

If all such intercompany lending had "operational" significance, the *Container* distinction between "flow[s] of capital resources" that serve an "investment function" and an "operational function" would be shattered. The *Container*

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[9] In *Mobil*, the Court stated that "dividends . . . derived from a *functionally integrated* enterprise . . . [are unitary business] income." 445 U.S. at 440 (emphasis added).

distinction is maintained only if the sharing of capital resources must be part of an effort to integrate the operations of similar businesses to serve an "operational function."

The Department's discussion of management oversight (Res. B. 22) reflects a similar misunderstanding of *Container*. The Department broadly argues that Super Valu's "managerial role in County Seat's affairs" was "extensive and nurtured County Seat's growth," without referring to specific activities. *Id.* In fact Super Valu provided only minimal management oversight of County Seat. *See* Pet. 5. More importantly, the character of the oversight reflected a desire to manage a discrete business investment; it was not grounded in the parent's "operational expertise" and "overall operational strategy."

CONCLUSION

The Department has not rebutted Super Valu's showing that the petition for a writ of certiorari should be granted.

Dated: April 30, 1992

Respectfully submitted,

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APPENDIX A

BEFORE THE IOWA STATE DEPARTMENT
OF REVENUE
HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

IN THE MATTER OF PROPOSED IOWA INCOME TAX ADJUSTMENT FOR:	PROTEST DOCKET NO. 86-510-2A-A (Department Use)

SUPER VALU STORES, INC.
E.I.N. 41-0617000
P.O. BOX 990
MINNEAPOLIS, MN 55440

FISCAL YEAR ENDING FEBRUARY, 1985

Dear Sir or Madam:

In accordance with Iowa Rule on Procedure 730-7.8(17A), protest is hereby made against a portion of your proposed audit adjustment of the Iowa Corporation Income Tax liability of the above-named taxpayer for the fiscal year ended February 23, 1985, as set forth in your notice of tax due dated November 5, 1986.

1. The taxpayer has conceded liability for income and privilege tax deficiencies assessed for the fiscal years ended February - 1980, 1981, 1982, 1983 and 1984 and has paid those deficiencies. The dispute involves only the taxable year ended February 1985. The auditor determined that the taxpayer owed additional income tax of $478,959 for that year. The taxpayer contends that it owes additional tax of

$156,286. The amount in dispute is the difference of $322,673. The computation of the claimed tax due is set forth in Exhibit A (Computation of Tax Due) and Exhibit B (Computation of Federal Tax Deduction).

2. *Request for Informal Conference*:

The taxpayer requests an informal conference before the Office of the State Tax Commissioner.

3. *Item to Which the Taxpayer Objects:*

The taxpayer objects to the determination that the capital gain realized on the sale of its stock in County Seat Stores, Inc. ("County Seat"), its wholly-owned subsidiary, is includible in its apportionable income.

4. *Grounds for Exception.*

On May 25, 1984, the taxpayer sold the stock of County Seat and realized a gain of $41,067,700 on the transaction. The issue is whether the gain is business income includible in the taxpayer's apportionable income. The taxpayer contends that the gain is *not* includible because the taxpayer and County Seat were not engaged in a unitary business.

5. The taxpayer is engaged in the wholesale food business. During the fiscal year ended February 1985, it sold food and non-food products at wholesale to independently-owned supermarkets in approximately 28 states. It also owned 26 subsidiaries. Most of the subsidiaries were engaged

in the wholesale food business or in providing services to that business or its retail-grocer customers. There were two subsidiaries, however, that were not engaged in the wholesale food business or activities ancillary thereto. These two subsidiaries were County Seat, which operated specialty retail clothing stores, and ShopKo Stores, Inc. ("ShopKo"), which conducted a retail general merchandising business.

6. The decision to treat the sale of the stock of County Seat as allocable income is supported by cases in which the Supreme Court has held that a "unitary business" is evidenced by "functional integration," "centralization of management," and "economies of scale." *See Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 438 (1980); *F. W. Woolworth Co. v. Taxation & Revenue Department*, 458 U.S. 354, 364 (1982); *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 178-179 (1983). The application of these principles to the present case is analyzed below.

7. A. *Functional Integration.* There were no intercompany sales between County Seat and Super Valu (or any of the other affiliates of Super Valu) at any time during the audit period. The same is true of ShopKo prior to the year ended February 1982. In 1982-1985, there were some intercompany sales between ShopKo and its affiliates, but they were minimal in comparison with the overall operations of ShopKo. Some of the affiliates of Super Valu provide services to Super Valu and its subsidiaries and to the retail customers of Super Valu. These

service affiliates include an insurance agency, an architectural firm, and a design studio. The service affiliates performed some services for County Seat and ShopKo during the audit period, but neither entity was required to obtain services from the service affiliates and the services were billed as if they were being provided to unrelated entities. Although "a substantial flow of goods" is not a prerequisite of a unitary business, *Container Corp. v. Franchise Tax Board, supra,* 463 U.S. at 178, the absence of a substantial flow of goods was a significant factor in deciding that unitary businesses did not exist in *ASARCO Inc. v. Idaho State Tax Commission,* 458 U.S. 307, 322-324, 329 n. 24 (1982), and in *F.W. Woolworth Co. v. Taxation & Revenue Department, supra,* 458 U.S. at 371.

8. County Seat and ShopKo differed from Super Valu and its other affiliates in that the former were not engaged, directly or indirectly, in the wholesale food business. As indicated, County Seat was a specialty retail clothing operation and ShopKo was a general retail merchandising operation. The products of the companies were therefore substantially different. Moreover, County Seat and ShopKo each operated essentially on an autonomous basis. Each of the two subsidiaries hired and fired all of its own employees except its president. Each had its own policies with respect to salary, bonus and other compensation arrangements, except for the president's compensation. Each had its own headquarters office, maintained its own accounting staff, and did its own purchasing. Each made its

own business decisions, and in making those decisions each attempted to maximize its own profits without regard to the profitability of Super Valu or of any other Super Valu subsidiary. Each prepared its own operating and capital budgets, subject to final approval by Super Valu.

9. There have been very few transfers of employees between Super Valu, on the one hand, and County Seat or ShopKo on the other. Each corporation had its own personnel department and, with two exceptions, "transfers" were the result of job changes initiated by employees in response to advertised vacancies, in the same manner as if the employees were transferring between unrelated employers. The two exceptions are the current Super Valu vice president for personnel, who was transferred from County Seat, and the current ShopKo controller, who was transferred from Super Valu.

10. Super Valu never pledged or otherwise used its interest in County Seat or ShopKo to borrow money. Neither has Super Valu received any dividend income from County Seat or ShopKo. Employees of Super Valu and County Seat were covered by a common pension plan, but employees of ShopKo were subject to a separate pension plan. Super Valu did perform some accounting, legal and tax services for County Seat and ShopKo, but received compensation for those services. Apart from those services, both County Seat and ShopKo were free to purchase services from outside sources of their own choice and did so. Super Valu did not guaranty any

of the liabilities of County Seat or ShopKo except for one industrial revenue bond issue of County Seat. There were intercompany borrowings, but net borrowers were charged for their use of funds through a "capital cost allocation" formula.

11. The facts of this case are thus analogous to those in *Woolworth*, where the Supreme Court concluded that the record was "persuasive" that Woolworth's operations were not functionally integrated with those of its subsidiaries. *See F.W. Woolworth Co. v. Taxation & Revenue Department, supra*, 458 U.S. at 364-366. At the same time, this case is distinguishable from *Container*, where the Supreme Court affirmed a finding that a "unitary business" existed on the basis of factors such as the taxpayer's assistance to its subsidiaries in obtaining equipment and filling personnel needs, the substantial role played by the taxpayer in lending funds to the subsidiaries and guarantying third-party loans to them, cooperation with respect to corporate expansion, and "substantial" technical assistance provided by the taxpayer to the subsidiary. *See Container Corp. v. Franchise Tax Board, supra.* 463 U.S. at 179-180. It is also significant that, while Container and its subsidiaries were engaged in the same line of business, Super Valu, County Seat and ShopKo were engaged in three distinctly different lines of business. *See Container Corp. v. Franchise Tax Board, supra*, 463 U.S. at 178.

12. B. *Centralization of Management.* None of the officers of County Seat or ShopKo was an officer or director of Super Valu, except for three or four Super Valu officers who also held offices in County Seat and ShopKo (but received no compensation from either) to facilitate the execution of legal and financial documents. The directors of County Seat and ShopKo were their respective presidents and, in each case, two other individuals who were officers and directors of Super Valu. The presidents of County Seat and ShopKo were charged with responsibility for operating their respective business organizations. All of the officers and employees of each subsidiary (except for the Super Valu officers described above) worked full-time on the affairs of that subsidiary. There was no common training program for employees of the three entities. In general, the boards of directors of County Seat and ShopKo met quarterly. The members of each board (other than the individual who served as president) were not routinely involved in the management of the entity or in the details of its affairs.

13. The mere fact that two officer-directors of Super Valu served on the boards of directors of County Seat and ShopKo, and that three or four Super Valu officers served as County Seat and ShopKo officers for reasons of convenience, does not mean that there was "centralization of management" as between either company and Super Valu. In *Woolworth*, there were common directors, communications between the upper echelons of management of the parent

and its subsidiaries, and requirements for the parent to approve the subsidiaries' major financial decisions. The Supreme Court held that ties of this kind were insufficient to establish a unitary business. In particular, the Court noted the absence of operational interdependence, centralized purchasing, and centralized merchandising. *See F. W. Woolworth Co. v. Taxation & Revenue Department, supra,* 458 U.S. at 366-372. These features are also absent from the present case.

14. C. *Economies of Scale.* The relationships between County Seat and ShopKo and their affiliates with respect to the provision of services to County Seat and ShopKo do not evidence the existence of a unitary business. In each case, County Seat or ShopKo acquired a service from an affiliate at a fair price. In some instances, the affiliate provided the same service to unrelated parties, and in those instances the services were provided to affiliated and unaffiliated entities on the same terms. Although there were a number of similar relationships in *ASARCO,* the Court concluded that a unitary business did not exist in that case, and there is no suggestion in the Court's opinion that relationships of this kind imply the existence of a "unitary business." *See ASARCO Inc. v. Idaho State Tax Commission, supra,* 458 U.S. at 321 n.17, 323 n.18, 324 n. 20 & 21.

15. In summary, functional integration, centralization of management, and economies of scale did not exist in this case. Therefore, County Seat and ShopKo were not engaged in a "unitary business" with Super Valu and its other subsidiaries, and Super Valu may not constitutionally be required to consider the gain from the sale of County Seat as business income for purposes of computing the Iowa income tax liabilities of Super Valu.

16. It necessarily follows from this conclusion that the capital gain realized by Super Valu upon its sale of the stock of County Seat may not be included in the apportionable income of Super Valu. *ASARCO* involved the treatment of dividend and interest income received by ASARCO from affiliates, interest income on evidences of indebtedness received upon the date [sale] of stock in affiliates, and capital gains realized upon the sale of affiliates' stock. The Supreme Court held that ASARCO and the affiliates were not engaged in a unitary business, and that the dividend income could therefore not be included in the apportionable income of ASARCO. The Court further held that the "interest and capital gains income derived [by ASARCO] from these [affiliated] companies should be treated in the same manner as the dividend income." *ASARCO Inc. v. Idaho State Tax Commission, supra*, 458 U.S. at 330. In this respect, the Supreme Court reached the same conclusion as had the Idaho Supreme Court. *See American Smelting & Refining Co. v. Idaho State Tax Commission*, 99 Idaho 924, 592 P.2d 39, 52 (1979) ("In our view the same standard applies to the question whether gains from

the sale of stock are business income as applies to the question whether dividends from the stock are business income.") Thus, since ASARCO and the affiliates were not engaged in a unitary business, the capital gain derived by ASARCO on the sale of the affiliates' stock could not be included in the apportionable income of ASARCO.

17. Subsequent to the decisions of the U.S. Supreme Court in *ASARCO, Woolworth,* and *Container,* the Missouri Supreme Court had occasion to consider the includibility of capital gain realized on the sale of the stock of a subsidiary in the apportionable income of the parent. *See James v. International Telephone & Telegraph Corp.* 654 S.W.2d 865 (Mo. 1983). After referring to *ASARCO, Woolworth* and *Container,* and noting the holding in *ASARCO* that dividends, interest and capital gains are treated in the same manner for purposes of determining their apportionability, the Missouri Court held that the taxpayer and its subsidiaries had not been engaged in a unitary business and that the gain realized on the sale of the subsidiaries' stock was therefore not includible in the apportionable income of the taxpayer. (654 S.W.2d at 868-870.)

18. Since County Seat was not part of the unitary business of Super Valu, the gain realized on the sale of the stock of that subsidiary may not be included in the apportionable income of Super Valu.

19. Under the penalties of perjury, I declare that I have examined this protest and that the facts presented therein are true, correct, and complete to the best of my knowledge and belief.

SUPER VALU STORES, INC.
P. O. BOX 990
MINNEAPOLIS, MINNESOTA 55440

By

David A. Cairns
Treasurer

APPENDIX B

No. 63735

RAY S. JAMES,
Director of Revenue of the
State of Missouri,

Appellant

v.

INTERNATIONAL TELEPHONE AND
TELEGRAPH CORPORATION,

and

STATE TAX COMMISSION OF MISSOURI,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
Nineteenth Judicial Circuit, Division I
The Honorable James F. McHenry, Judge

APPELLANT'S REPLY BRIEF

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ATTORNEYS FOR APPELLANT

ARGUMENT

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Applying the more stringent Due Process Clause analysis to the case at the bar, appellant contends the threshhold question of nexus is established by ITT's own unitary business definition of itself. ITT is a unified business with deliberately diversified product lines; telecommunications, engineered products, consumer product, natural resources, and insurance and finance .... One facet of this unified business was conducted in Missouri. Moreover, ITT has filed and received the benefits of a consolidated Missouri tax return. Accordingly, the state of Missouri has given protection, opportunities and benefits and may ask for something in return. *See, Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 440 (1940); *ASARCO, supra* at 4964. Moreover, each of the subsidiaries producing capital gains for the parent ITT corporation has done business in the state of Missouri.